80-1474

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

ANDREW J. WINSTON, Sheriff,
City of Richmond,

AUBREY M. DAVIS, Commonwealth's Attorney
for the City of Richmond,

CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I

Petitioners,

v.

JOSEPH G. MOORE, JR.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. MARSHALL COLEMAN,
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

Supreme Court, State Library Building
Richmond, Virginia 23219

QUESTION PRESENTED

I. WOULD PETITIONER HAVE BEEN SUBJECTED TO DOUBLE JEOPARDY WHEN THE TRIAL COURT DECLARED A MISTRIAL ON THE GROUND THAT THE JURY COULD NOT REACH A VERDICT AND THEREAFTER SCHEDULED A RETRIAL?

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PRELIMINARY STATEMENT

Andrew J. Winston, Aubrey M. Davis, and Circuit Court of the City of Richmond, Division I, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on December 18, 1980.

For purposes of uniformity, the Respondent herein, Joseph G. Moore, Jr., shall hereinafter be referred to as Petitioner, and the Petitioners herein, Andrew J. Winston, Aubrey M. Davis, and Circuit Court of the City of Richmond, Division I, shall hereinafter be referred to as the Commonwealth.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, is included in the Appendix. The Opinion of the United States Court of Appeals for the Fourth Circuit dated December 8, 1980, is included herein in the Appendix.

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged with feloniously breaking and entering with intent to commit larceny and was tried on January 9, 1980, by the Circuit Court of the City of Richmond, with a jury. The jury was unable to reach a verdict, and the Trial Court declared a mistrial. Subsequently, another trial upon the same charge was scheduled.

On March 10, 1980, Petitioner was again tried before another jury, all evidence was presented, and at approximately 4:35 o'clock p.m. the jury retired to deliberate. At approximately 6:00 o'clock the jury recessed for the evening.

Prior to recessing, the Trial Court had been made aware that at least one member of the jury was sick with the flu and was crying and that another desired to return home that night because his wife was ill. In addition, the Trial Court was concerned about another juror's willingness to ever vote for a conviction.

The next morning at 10:00 a.m., the Court gave the jury its version of the "Allen" charge. The charge was given, according to the Trial Court, in the hope of "dynamiting what otherwise might be a hung jury" and was described by the Trial Court as being successful "in the last couple of years." The Trial Court felt "from the demeanor of the jurors" that a verdict would be "difficult to come by" and "sensed considerable discord in the jury and among the jurors."

The jury then began deliberating. At approximately 10:50, however, the jury "buzzed" the courtroom, and the Trial Court brought the jury into the courtroom and summoned counsel.

The Trial Court then asked the jury whether they had reached a verdict, and the foreman replied, "Your Honor, the jurors have not been able to reach a verdict." The Trial Court then excused the jury and declared a mistrial, no objection having been made by the Petitioner. The Court said it felt that the jury was hung when "the foreman said it was hung."

Prior to a scheduled third trial, Petitioner filed in the Circuit Court a Petition for a Writ of Habeas Corpus, com-

plaining that retrial would subject him to double jeopardy. The Court denied the Writ. The Supreme Court of Virginia affirmed the decision of the Circuit Court the same day.

Petitioner then filed in the United States District Court for the Eastern District of Virginia, Richmond Division, a Petition for a Writ of Habeas Corpus pursuant to the provisions of 28 U.S.C. § 2254. The Court, after considering the evidence and argument of counsel, granted the Writ. The case was appealed to the United States Court of Appeals for the Fourth Circuit, a panel of which, by decision of December 18, 1980, affirmed the District Court decision, one judge dissenting in a per curiun opinion.

I. PETITIONER WAS NOT SUBJECTED TO DOUBLE JEOPARDY WHEN THE TRIAL COURT DECLARED A MISTRIAL ON THE GROUND THAT THE JURY COULD NOT REACH A VERDICT AND THEREAFTER SCHEDULED A RETRIAL.

The leading case relating to double jeopardy decided by this Court is *United States* v. *Perez,* 9 Wheat 579 (1974). There, this Court, holding that the defendant had not been subjected to double jeopardy when he was retried after the jury had been unable to agree at his first trial, stated in 9 Wheat at p. 580 as follows:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.... But, after all, they [the courts] have the right to order the discharge; and the security which the public have for the faithful, sound, and

> conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."

Cases decided by this Court subsequent to *Perez, supra,* have followed in the footsteps the above-quoted language.

In *Wade* v. *Hunter,* 336 U. S. 684 (1949), *reh. den.* 337 U. S. 921 (1949), this Court held that the defendant had not been subjected to double jeopardy where his court-martial had been dismissed before the decision had been reached because a peculiar military tactical situation had prevented the attendance of additional witnesses within a reasonable time. After citing *Perez, supra,* this Court refused to adopt a strict rule that absence of witnesses could never justify discontinuance of the trial and disagreed with the argument that there had been violation of the double jeopardy provision because there had been no "urgent necessity." That Court pointed out that it had stated in the *Perez* case that "the sound discretion of a presiding judge should be accepted as to the necessity of discontinuing a trial." (336 U. S. at p. 692).

Thereafter, in *Gori* v. *United States,* 367 U. S. 364 (1961), the defendant claimed that his retrial subjected him to double jeopardy where his first trial resulted in a mistrial declared by the Court when it had withdrawn a juror. Citing earlier cases including *Perez, supra,* and *Wade, supra,* this Court stated:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." 367 U. S. at p. 368.

This Court stated that the case fell within the "broad considerations" of the language in *Perez, supra,* and stated:

> "It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously

> to exercise their most sensitive judgment—according to their own lights in the intermediate exigencies of trial—for the more effective protection of the criminal accused." (367 U. S. at pp. 369-370).

In *United States* v. *Jorn,* 400 U. S. 470 (1971), where a mistrial had been declared by the District Court which felt that potential witnesses had not been adequately warned of their rights, this Court held the defendant to have been subjected to double jeopardy, concluding that the Trial Judge had "abused his discretion in discharging the jury" and had "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial."

In *Arizona* v. *Washington,* 434 U. S. 497 (1978), the Trial Court granted the prosecution's motion for a mistrial where there had been improper comment during defense counsel's opening argument. Attacking a probable retrial, petitioner claimed he would be subjected to double jeopardy.

This Court stated that the words, "manifest necessity," did not "describe a standard that can be applied mechancially or without attention to the particular problem confronting the trial judge" and added:

> "We are persuaded that, along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to special respect." (434 U. S. at p. 510).

In all of the above cited cases this Court has been consistent in application of the "manifest necessity" test to a variety of circumstances presenting themselves at trial. However, in none of these cases has this Court had occasion to apply the test to circumstances similar to the instant case.

In the instant case, the Court of Appeals has, in effect, held that the Trial Court did not exercise sound discretion in discharging the jury. One of the more solemn duties vested

with trial courts is that of declaring a mistrial, where proper. Intrusion into the discretion given a trial court should not be viewed lightly, and guidelines for such intrusion should be as clear as possible. It is for that reason, therefore, that this Court should grant certiorari herein.

In addition, the instant case presents an issue as to whether the Trial Court was bound to question each member of the jury individually in order to determine that a verdict could not be reached. Petitioner argued this position both at the District Court and at the Court of Appeals. If there be such a requirement, it is one which is an extremely important one procedurely, and this Court should pass upon the validity of it.

The instant case also presents an issue of whether double jeopardy can be waived by failure of defense counsel to object to an improper mistrial. While in the instant case defense counsel maintained that the Court acted before he had the opportunity to object, no reason has been suggested as to why defense counsel could not have interrupted the Trial Court in order to make the objection or ask the Trial Court to reconsider its decision to declare a mistrial. The issue of whether double jeopardy may be waived is one not fully decided by this Court. Indicative of this is this Court's statement in *Menna* v. *New York,* 432 U. S. 61 (1975), where this Court stated, "We do not hold that a double jeopardy claim may never be waived." 432 U. S. at p. 63, n. 2.

It is submitted, therefore, that important and somewhat novel issues are present in the instant case. If certiorari be granted, this Court will have the opportunity to apply the prohibition against double jeopardy to facts dissimilar from those in any other case decided previously by it, the opportunity to review the issue of whether a trial court, before declaring a mistrial, must first question each juror, and the additional opportunity to review the issue of whether, and under what circumstances, a double jeopardy claim may be waived by defense counsel by failure to object.

Certiorari should be granted in the instant case for the additional reason that the decision of the Court of Appeals is in conflict with that of the Virginia Supreme Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, Counsel for the Petitioners in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before February 26, 1981, I mailed copies of the foregoing Petition for a Writ of Certiorari to Joseph S. Bambacus, Esquire, 605 Mutual Building, Richmond, Virginia 23219, Counsel for Respondent.

Linwood T. Wells, Jr.
Assistant Attorney General

APPENDIX

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ORDER ENTERED BY THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I, DECLARING A MISTRIAL AND SCHEDULING PETITIONER'S CASE FOR RETRIAL, ENTERED MARCH 11, 1980.

COMMONWEALTH

vs

Indictment for Statutory Burglary F-11-193

JOSEPH GREEN MOORE, JR., Dft.

Trial of the above case began on March 10, 1980, at which time the defendant was led to the bar in the custody of the Sheriff of this City and was represented by Attorneys Joseph Bambacus and Stylian P. Parthemos, retained, and the Commonwealth was represented by Carol N. Breit.

And the defendant being arraigned, pleaded not guilty to Statutory Burglary as charged in the indictment, after consultation with counsel.

And the Sheriff of this City having returned the writ of venire facias heretofore issued by order of this Court, with the names of the persons summoned in pursuance thereof, and of the veniremen so summoned and attending, a panel of twenty qualified jurors, free from exception for the trial of the defendfant was made up and completed. And the Attorney for the Commonwealth and the Attorney for the accused having alternately, beginning with the Attorney for the Commonwealth, each stricken the names of four of the said veniremen, the remaining twelve constituted the jury for the trial of the accused, and they were sworn the truth of and upon the premises to speak.

The witnesses were then sworn and the evidence and arguments of counsel presented, and the jurors retired to their room in the custody of the Sheriff of this City to deliberate upon a verdict in this case. And after some time the jurors being unable to reach a verdict and the hour being late, said case was continued to March 11, 1980, at 10:00 A.M., and the jurors were adjourned to said day and hour, having been admonished by the Court, and the defendant was remanded to jail.

The defendant was this day, March 11, 1980, again led to the bar in the custody of the Sheriff of this City and also came his counsel and that for the Commonwealth, as of record, and the jurors sworn on March 10, 1980, appeared according to their adjournment.

And the jurors retired to their room in the custody of the Sheriff of this City for further deliberation upon a verdict in this case. And after some time, being unable to reach a verdict, the jurors returned into Court and mistrial declared. And the jurors were discharged from further consideration in this case.

And said case is re-set for trial by jury on April 16, 1980, and witnesses as stated in the record were recognized to appear on said day.

And the defendant by counsel moved the Court to set bond, which motion the Court denied and the defendant is remanded to jail.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I, GIVEN AT THE CONCLUSION OF THE HEARING HELD ON APRIL 16, 1980.

Judge:

Alright. I will say this. I think a little bit of history is in order. Nobody has talked about the first trial. I'm not asking whether you agree with this, I'm saying the Court's recollection of the first trial is that after an hour or so the jury returned with a question, and the question was to the effect that whether the basement where the defendant was found was part of Mr. McGowans "property". At that time I explained to the then foreman, or rather before he ever asked his question, I explained that where there is a question that may be perfectly logical and reasonable, that under the rules under which this court is bound, it was quite possible I would not be able to answer the question. So, Counsel were conferred with briefly and I told the jury that all while the question was logical and reasonable. I was not committed to answer it. That they had heard all the evidence, they had all the instructions, and so

Judge:

would they please continue to deliberate. I was satisfied then that the jury would hang. Because I had a clear recollection that the question had not been asked. And while I have not read a transcript of the first trial, it is still my clear recollection that that question was not asked. And an hour or two later, the jury, in effect, notified the Court that it was hung and so it was declared to be hung. The second trial, the jury had been out an hour or so and I believe it happened that both counsel were in chambers when sheriff Johnson reported that two of the jurors in effect had to go home and that those jurors were adamant, that one had a sick wife and the other I don't have a clear recollection, that there was then a message that she was not feeling well, that she had inquired about staying over night and so the jury was sent home for the evening after being admonished. Yes, indeed, it was the most obvious thing in the world that a white female juror was crying, that she had a handkerchief, or kleenex to her facial area. I would take it that everybody took note of that. At any rate, at sometime the message was received that she had the flu, there was no verdict in the evening, they were sent home, and the next morning at 10:00 o'clock, because I anticipated or I felt from the demeanor of the jurors that a verdict would be difficult to come by, I started with my version of the *Allen* charge. My version of the *Allen* charge may be different from other judge's in that I've taken the *Allen* charge as approved in the Poindexter case and rephrased it with emphasis maybe in hopes of dynamiting what otherwise might be a hung jury, and this has been successful in the last couple of years on numerous occasions. I mention that because I felt then that it would be difficult for that jury to reach a verdict. I thought the jury should reach a verdict and since dynamiting is approved, I dynamited. Of course, I was cognizant with the problem of the white female and her demeanor, and another juror, a male juror, and his demeanor, and I frankly had never faced this before and I have to digress for a moment to say that the jurors, and the jury officer Mr. Billips, gives jurors at the beginning of every month, a thorough orientation and the judges take turns hearing jury excuses and if any—think I think we're liberal in excusing the jurors for

Judge:

sickness, vacation, whatever. At any rate, I have never had the occasion before of jurors deciding when they should go home for the evening and as it was relayed to me, these two jurors were not making, they were telling; and so, on the next morning, after the dynamite and after another approximate hour, the jury returned and I was satisfied that the jury was hung from the demeanor of the jurors and reached a verdict the evening before, they had not reached a verdict that morning, I sensed considerable discord in the jury and among the jurors. One of the 12 jurors had been tried in this courtroom on a drug charge some years earlier and the expungement statute had been effected, the effect of which was that she was not convicted. I recall also a drug case I had had 5 or 6 years ago with a jury and I believe that same juror was even present in the courtroom, as an interested spectator in the *Jefferson* jury case about 1972. At any rate she remained on the jury. I mention that because the consequence of all of this was my strong feeling that this jury was hung when the foreman said it was hung. Having never before experienced from jurors what had happened with these 2, as the transcript shows, I said to the jury then that I am going to excuse you in a moment but I have some remarks to address to two of the jurors, and I did not name names, but I knew that they knew of whom I spoke, and that it on pages 5, 6, and 7 of the transcript. I guess it is safe to characterize it as a chastizement of those two jurors. At any rate, at that time I discharged the jury and would do the very same today were it to arise. I otherwise concur in the argument presented by the Commonwealth's Attorney and see no need to repeat references to cases or other arguments. Motions, Mr. Bambaccus, are denied and the case is set with a jury tomorrow at 10:00 o'clock.

ORDER ENTERED BY THE SUPREME COURT OF VIRGINIA DISMISSING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS, ENTERED APRIL 16, 1980.

Joseph B. Moore, Jr.,
Petitioner,

against Record No. 800566

Andrew J. Winston, Sheriff of the City of Richmond, et al.,
Respondents.

Upon a Petition for a Writ of Habeas Corpus and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction

On April 16, 1980, came Joseph B. Moore, Jr., by counsel, and filed a petition for a writ of habeas corpus, and for other relief, in the above-styled case.

Upon consideration whereof, the court is of opinion that the writ of habeas corpus, and other relief, should not issue as prayed for and it is ordered that the petition and application be, and the same are hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, GIVEN AT THE CONCLUSION OF THE HEARING HELD ON APRIL 17, 1980.

I find as a fact the matters set forth in the sworn petition. I find as a fact the findings of fact reached by the trial judge, Judge Lumpkin. I do not necessarily find the conclusions. For instance, I do not find as Judge Lumpkin found that the jury informed him that they were deadlocked, since the transcript shows that his colloquy was only with the foreman, and the foreman's answer was not that they were unable to reach a verdict, but that they had not reached a verdict.

I find nothing irrational or unreasonable in the action taken by Judge Lumpkin. However, the question is not, I think, whether it was irrational or unreasonable, but, instead, whether or not it complied with the law as laid down in *United States* against *Perez,* that is, that a mistrial can be declared only if there is a, quote, manifest necessity, end quote. And this question of manifest necessity has been interpreted by the Third Circuit in *Rusoe* and in *Webb,* cases which the lawyers in this case have agreed are the law of this case.

And the method by which manifest necessity is to be determined is set forth in those cases and controls. That method was not followed so that there is no record which can support a finding of manifest necessity.

There is, of course, no magic number of hours. However, the fact that the jury had just had, presumably, a night's rest, and had been deliberating for approximately an hour at the time that the mistrial was declared does not lead this court to believe that there had been such a lengthy period of deliberation that the length of deliberation was a factor to be considered in determining manifest necessity. To the contrary, the length of deliberation is a factor which suggests the absence of manifest necessity. In addition, the colloquy between the court and the jury foreman is not clearly an indication of a manifest necessity. The colloquy disclosed under the circumstances that one could infer, reasonably infer, that the foreman believed that not only had no verdict been reached but that none could be reached, and I'm sure that is the inference that Judge Lumpkin drew. And, as I say, it's certainly a reasonable inference. And yet the right to be free from double jeopardy is such that the Supreme Court and the Circuit Courts have indicated that the judge's duty is to inquire further and to be reasonably certain, as reasonable as we can be, that there is indeed a manifest necessity.

Accordingly, I think that the answer of the foreman was insufficient to form a record upon which one could determine that there was a manifest necessity to declare a mistrial.

Further, I think that it is clear from the cases that it's the duty of a judge to inquire of the jury as a whole. I can readily

believe that perhaps some one or more of the jurors nodded their head, or gave some other indication of assent, but Judge Lumpkin made no such finding. Therefore I cannot simply reach that conclusion out of thin air. I must base my conclusions on the record, and the record indicates that there was no effort to determine from the other 11 jurors what their view was on whether or not there was a manifest necessity or whether or not the jury would be able to reach a verdict were it allowed to deliberate further.

I think that such an inquiry by the court is required by the law, and in the absence of such an inquiry there is no record which would support a finding that a mistrial was manifestly necessary. Accordingly, the court will direct the issuance of a writ of habeas corpus to the petitioner, Joseph G. Moore, Jr., and Joseph G. Moore, Jr., shall be free from any further jeopardy on the charges set forth in the indictment against him set forth in the record in this case.

FINAL JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, ENTERED ON MAY 12, 1980.

JOSEPH G. MOORE, JR.

v.

ANDREW J. WINSTON, etc., et al.

CIVIL ACTION
NO. 80-0283-R

JUDGMENT ORDER

Final judgment is entered in accordance with the findings of fact and conclusions of law stated by the Court in the plenary hearing on 17 April 1980.

And it is so ORDERED.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, ENTERED ON DECEMBER 18, 1980.

No. 80-6405

Joseph G. Moore, Jr.,

Appellee,

v.

Andrew J. Winston, Sheriff, et al.

Appellants

PER CURIAM:

The Commonwealth of Virginia appeals the district court's grant of a writ of habeas corpus on the ground that retrial of the prisoner, Joseph G. Moore, Jr., would subject him to double jeopardy. We affirm for the reasons adequately stated by the district court.

AFFIRMED.

Judge Widener dissents.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1474

ANDREW J. WINSTON, Sheriff,
City of Richmond,

Aubrey M. Davis, Commonwealth's Attorney
for the City of Richmond,

CIRCUIT COURT OF THE CITY OF RICHMOND
DIVISION I

Petitioners,

v.

JOSEPH G. MOORE, JR.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent,

605 Mutual Building
Richmond, VA 23219

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1474

ANDREW J. WINSTON, SHERIFF,
City of Richmond,

AUBREY M. DAVIS, Commonwealth's Attorney,
for the City of Richmond,

CIRCUIT COURT OF THE CITY OF RICHMOND,
Division I

Petitioners,

v.

JOSEPH G. MOORE, JR.

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondent adopts the Appendix of Petitioners as amplified by Respondent's Statement of the Case and Appendix herein included.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENTS V AND XIV

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

With the exception of the first two paragraphs of Petitioners' Statement of the Case, Respondent disagrees with Petitioners' Statement of the Case, in that Petitioners have misstated the facts and have omitted relevant facts.

Prior to recessing on March 10, 1980, the trial Court had not been made aware of any sickness on the part of any juror. To the contrary, the only communication sent to the Court by

the jury was that two of the jurors did not desire to deliberate any further that day and wished to go home. (Appendix p.3.) Moreover, the Court's chastisement of the two jurors on the next day for requesting to be excused at 6:00 o'clock p.m. on the previous day contradicts the allegations concerning the two jurors (Appendix pp. 6-8.)

To the extent that the Petitioners' Statement of the Case alleges that no objection was made to the declaration of a mistrial, the same is not disputed. However, the Petitioners fail to state that during the course of the trial when the trial Court made an erroneous ruling of law with respect to the admissibility of character evidence and counsel for the Respondent attempted to address the Court, the Court called counsel and the prosecutor to the Bench and threatened counsel for the Respondent with a citation for contempt should he make any further interruptions, all out of the presence of the court reporter. Furthermore, counsel for Respondent was never afforded an opportunity to object, and any objections after the declaration of a mistrial would have been highly inappropriate as will more clearly appear in this Brief in Opposition. Moreover, the statement that the jury was hung "when the foreman said it was hung," is totally unsupported by the facts or by the record. (Appendix, p. 6).

Prior to the scheduled third trial, the Respondent never filed any Petition for a Writ of Habeas Corpus in the Circuit Court of the City of Richmond. He filed a Motion to Dismiss the indictment on the grounds that the third trial would violate his rights under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. The Motion to Dismiss was filed well in advance of the trial date. It was mailed to the trial Court on March 24, 1980, with the request that if the Court desired oral argument, Respondent wanted to have the argument as soon as possible so as to be in a position to apply for appropriate habeas relief in the unforeseeable event that the Court overruled the Respondent's Motion (Appendix, pp. 9-11). Notwithstanding the Petitioner's request for an early hearing, the trial Court scheduled the hearing for 3:30 o'clock p.m., on April 15, 1980, that being the eve of the scheduled third trial on April 16, 1980. (Appendix, p. 12).

Because of the Court's questionable action in scheduling argument on the Respondent's Motion to Dismiss the indictment at 3:30 o'clock p.m. on April 15, 1980, the Petitioner was compelled to file a Petition in the United States District Cou for the Eastern District of Virginia, Richmond Division, asking for a writ of habeas corpus pursuant to the provisions of Title 28, United States Code, Section 2254, and injunctive relief

to avoid being tried a third time. That Court entered a temporary restraining Order and, with the acquiescence of the Attorney for the Commonwealth of Virginia, a plenary hearing was scheduled for 9:00 o'clock a.m., on April 17, 1980.

Interestingly, no answer was filed to the Petition for a Writ of Habeas Corpus, and the allegations therein contained were admitted. (The Petition is contained in Appendix, pp. 13-19.)

Of even greater significance, at the hearing on the request for a temporary restraining Order, the Petitioners agreed that the cases of United States v. Lansdown, 460 F.2d 164 (4th Cir., 1972); United States ex. rel. Russo v. Superior Court of New Jersey, 483 F.2d 7 (3rd Cir., 1973), cert. denied 414 U.S. 873 (1973); and United States ex. rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3rd Cir., 1975), were the controlling law. (Transcript of hearing before The Honorable D. Dortch Warriner, April 16, 1980, page 46, 47, 48)(Appendix, pp. 20-23).

I. RESPONDENT WAS SUBJECTED TO DOUBLE JEOPARDY WHEN THE TRIAL COURT DECLARED A MISTRIAL ON MARCH 11, 1980.

The Petitioner agrees that the leading case relating to double jeopardy decided by this Court is United States v. Perez, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 in which the Court stated clearly that when a jury is discharged by the trial Court from giving a verdict upon an indictment, there must either be (1) a manifest necessity for the act; or (2) the ends of public justice

would otherwise be defeated. If the jury is discharged in the absence of manifest necessity, then retrial of the defendant is barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment proscription against twice putting a defendant in jeopardy for the same offense has been held to be enforceable against the states through the Fourteenth Amendment in the case of Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969).

In spite of its consistent reiteration of the standard of manifest necessity, this Court has explicitly and consistently refused to elaborate on the manifest necessity standard by not establishing precise rules to govern what factual contexts present a manifest necessity that would require or allow a trial court to dismiss a jury without rendering a verdict on an indictment, while at the same time allowing a retrial of the defendant without running afoul of the Fifth Amendment's proscription against double jeopardy.

The Petitioners attempt to obscure this fact in their Petition by citing a series of United States Supreme Court cases which deal with the propriety of declaration of mistrial, but none of which involved a declaration of mistrial because of a deadlocked jury. Wade v. Hunter, 336 U.S. 684 (1949), reh'g denied 337 U.S. 921 (1949) (witnesses unable to attend court-martial due to military tactical situtation); Gori v. United

States, 367 U.S. 364 (prejudicial impact upon jury from improper questioning by prosecutor); United States v. Jorn, 400 U.S. 470 (1971) (failure of prosecution to adequately warn witnesses of their Fifth Amendment rights); Arizona v. Washington, 434 U.S. 497 (1978) (improper comments by defense counsel during opening statement).

The Petitioners' citation of the above listed cases is in direct contradiction of the position taken by them in the District Court that United States ex. rel. Webb v. Court of Common Pleas, supra, United States ex. rel. Russo v. Superior Court of New Jersey, supra, and United States v. Lansdown, supra, are the controlling law in the case at bar. This inconsistent and contradictory tactic should be sufficient standing alone to counteract the Petitioners'reliance upon the cases cited by them, inasmuch as they, through their concessions in the District Court, made Webb, Russo and Lansdown the controlling law in the case at bar.

The Petitioners' cases, however, are easily distinguishable from the instant case, and while they accurately state the law as it applies to the declaration of a mistrial in certain unique cases, none of them sheds any further light on the standards of review to be employed when the propriety of a declaration of mistrial for jury deadlocked is challenged.

Each of the cases cited by Petitioners dealt with specific factual circumstances, different from the ones presented in the

instant case, where a trial court had declared a mistrial, and in each case the Court applied the "manifest necessity" principal first enunciated in Perez. The application of Perez standards to factual contexts totally dissimilar to the case at bar can shed no light on the propriety of the state Court's action in the case at bar. The Petitioners have cited these cases in an effort to lend support to their contention that the trial judge should be granted a degree of discretion that would be tantamount to refusing completely to review the actions of the trial Court. This is in direct contradiction of the language of the Court in Arizona v. Washington, supra, the most recent of the cases cited by the Petitioners:

> "Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." 434 U.S. at p. 497 (emphasis added).

The United States Circuit Courts of Appeals have often addressed themselves to the specific factors to be considered

in determining whether a trial Court's discharge of a jury for inability to render a verdict meets the manifest necessity test first articulated in United States v. Perez.

The United States Court of Appeals for the Fourth Circuit, in United States v. Lansdown, 460 F.2d 164 (4th Cir., 1972), was called upon to render a decision in a case that was very similar factually to the case at bar.

In Lansdown, the Court held that no manifest necessity for the declaration of mistrial existed, and remanded the case for entry of an order dismissing the indictment. The following exerpt from page 169 of Lansdown speaks directly to the issues raised by the instant case and would seem to dispose of the issues in favor of the Petitioners:

> "While the length of deliberations is a relevant factor, the more important consideration is whether there is a possibility that the jury can reach a verdict within a reasonable time. The most reliable source as to this information is the jury itself. The conclusion that a jury is unable to reach a verdict must be supported by something in addition to the trial court's conclusion that the jury has deliberated long enough."
>
> "We conclude that there was no 'manifest necessity' in this case for declaring a mistrial when the district court did so. The district court, without considering any other factors, simply concluded that approximately 11 hours of deliberation, in a case presenting a close question of credibility was long enough. The district judge did not seek the opinion of counsel or the defendant; after having told the jury that it could be 'leisurely in its deliberations,' he made no inquiry as to whether the jury was about to reach a verdict or thought that a verdict was possible."

The Circuit Courts have isolated several factors to be considered in determining the propriety of a trial judge's declaration of a deadlocked jury. They are as follows:

1. A timely objection by the defendant;
2. The jury's collective opinion that it cannot agree;
3. The length of the deliberations of the jury;
4. The length of the trial;
5. The complexity of the issues presented to the jury;
6. Any proper communications which the judge has had with the jury; and
7. The effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict.

These factors have been specifically adopted in their entirety by at least two Circuits, Arnold v. McCarthy, 566 F.2d 1377, 1386-87 (9th Cir., 1978); United States v. Horn, 583 F.2d 1124, 1127 (10th Cir., 1978), and all other circuits that have considered the question have isolated some or all of these factors as significant in determining whether discharge of a jury was required by manifest necessity, United States v. Gordy, 526 F.2d 631, 635-36, (5th Cir., 1976); United States ex rel. Russo v. Superior Court of New Jersey, 438 F.2d 7, 16 (3rd Cir., 1973); cert. denied 414 U.S. 1023; United States v. Goldstein, 479 F.2d 1061, 1068 (2nd Cir., 1973), cert. denied, 414 U.S. 873; United States v. Lansdown, 460 F.2d 164, 1970. (4th Cir., 1972). It is interesting to note that, while this Court has remained silent as to the specific factors to be

considered in making the determination of manifest necessity, it has denied certiorari in the only two cases listed above in which there was an application for a writ.

In United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3rd Cir., 1975), the Circuit Court of Appeals for the Third Circuit reversed a District Court's denial of a writ of habeas corpus upon finding that the state trial court's decision to discharge a second jury was based on a record that did not sufficiently reflect that discontinuation of the proceedings was a manifest necessity or that the ends of public justice would not be served by continuation of the proceedings.

As in the case at bar, the defendant had been previously tried, and the first trial had terminated with a declaration of a deadlocked jury. The defendant was charged with participating in the robbery of a church rectory. At the second trial, two of the clergymen who had been in the rectory at the time of the robbery identified the defendant as one of the robbers. The defendant, on the other hand, presented testimony that he had spent the evening at some friends' apartment until 11:00 p.m., the approximate time of the robbery. At that time, he claimed he returned to his own apartment, across the hall from where he had been visiting, where he stayed with his wife and children for the remainder of the night.

The second trial lasted for six days, with the jury commencing deliberations at 10:37 a.m. on the sixth day. At 2:13

p.m. the jury returned to the courtroom for additional instructions. They recommenced deliberations at 2:35 p.m. At 5:43 p.m. the judge, on his own initiative, asked the jury to return to the courtroom. A short colloquy between the trial court and the jury foreman demonstrated that the foreman did not believe the jury could reach a verdict. At that time, the Court discharged the jury. The jury had deliberated for approximately 6-1/2 hours. 516 F.2d at pp. 1035-1036.

Among the factors which the appellate court found significant in determining that the discharge of the jury was not dictated by manifest necessity, was the fact that the trial judge did not consult with or inform either counsel prior to dismissing the jury.

Significantly, a second factor heavily relied upon by the appellate court was that the trial court directed its interrogatories solely to the jury foreman, and only the jury foreman responded. The trial court did interrogate the foreman to determine that the foreman believed that the jury would not be able to reach a verdict, which was a step significantly beyond the trial court's action in the instant case. (Appendix, p. 6). Yet the United States Court of Appeals for the Third Circuit, in Webb, still held that the trial court had not gone far enough in its interrogation, because it had failed to determine the collective opinion of the jury as to whether it was in fact deadlocked.

Finally, the Court placed great weight upon the fact that this was the second trial of the defendant, and that previously another jury had been discharged for inability to reach a verdict:

> "A final factor supporting the prohibition of further proceedings against Webb with regard to the accusations here is the earlier discharge of the jury at the first trial. Thus the Commonwealth has already twice subjected Webb to 'the heavy personal strain which a criminal trial represents for the individual defendant.' The existence of the prior proceedings, which were known to the second court, mandated the exercise of even greater caution before depriving Webb of the opportunity 'of being able, once and for all, to conclude his confrontation with society through the verdict' of the jury then sitting." 516, F.2d at p. 1045."

In the case of United States v. Horn, 583 F. 2d 1124 (10th Cir., 1978) the defendants were charged with submitting false tax exemption statements to employers. The case was tried as to both defendants over a two-day period, and at 5:30 p.m. on the second day, the jury retired to deliberate. After two short interruptions, at which times the jury asked for clarifications from the trial judge, the jury sent a note, signed by its foreman, stating that "The jury appears to be deadlocked." The note was sent at 8:57 p.m.

The Court recessed the jury for the evening. The jury reconvened at 9:00 a.m. on the following morning at which time the judge gave them the Allen charge before sending them to the jury room for further deliberations. After something more than

another hour of deliberation, the judge brought the jury back into the courtroom at 10:40 a.m. At that time, the judge declared a mistrial:

> "I am now going to do what I should have done last evening when I received your note that you were deadlocked. I perhaps should have at that time declared a mistrial but I thought maybe going home and sleeping upon it, being a little fresher this morning and maybe you might break the deadlock but you have been out an hour this morning and have not so I am going to declare a mistrial." 583 F.2d at p. 1125."

The Court made no inquiry of the foreman or of individual jurors.

The Court held that the trial judge's failure to question the jury foreman as well as the jury, either individually or as a group, and his failure to ascertain whether all the members of the jury believed that they were deadlocked, prevented the trial court from making an accurate determination as to whether a manifest necessity existed for declaring a mistrial. That being the case, the appellate court held that retrial of the defendant was barred by the double jeopardy clause. 583 F.2d at p. 1129.

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir., 1978) is an instructive case, in that it outlines the proper procedure for a trial court to follow in determining whether a jury is, in fact, deadlocked, and thus a declaration of mistrial manifestly necessary.

The jury had deliberated for twelve hours when it returned to the courtroom, unable to reach a verdict. At that time, the trial court questioned the jury foreman, who stated that he believed the jury was deadlocked, and it questioned the jury as

a group to determine whether they actually felt there was no reasonable probability of reaching a verdict. Only one juror indicated that he thought a verdict could be reached. 566 F. 2d at p. 1386.

In holding that the trial court's declaration of a mistrial was proper, the Court enumerated the seven factors herein cited on page 10, and then found that the most critical factor was the jury's own statement that it was unable to reach a verdict.

The similarities between the case at bar and Webb, supra, and Horn, supra, discussed above are obvious. As a matter of fact, there was at least evidence of jury deadlock in Webb and in Horn. In the instant case, there is no evidence of jury deadlock whatsoever. Similarly, the distinctions between the case at bar and Arnold, supra, further underline the Court's failure in the instant case to exercise the requisite effort to determine if a manifest necessity did indeed exist for declaring a mistrial. This can be more readily seen by applying the facts of the case at bar to the seven factors set forth in Arnold v. McCarthy, supra, and United States v. Horn, supra, for determining whether the declaration of a deadlocked jury was proper.

A. Timely objection by the defendant. It is interesting to note that the courts have determined that an objection by the defendant to the discharge of the jury is not a prerequisite to a plea of former jeopardy based on improper jury discharge.

Rather, it is only a factor to be considered in conjunction with the other facts and circumstances of the case.

In the instant case, the Respondent was never afforded an opportunity to make a timely objection to the discharge of the second jury. The jury returned to the courtroom without consultation with counsel. Counsel had no idea why the jury was being returned to the courtroom. At that point, the Court engaged in a short colloquy, set forth on page 5 of the Appendix. The Court immediately discharged the jury.

In the case of United States ex. rel. Russo v. Superior Court of New Jersey, 483 F.2d 7 (3rd Cir., 1973), the United States Court of Appeals for the Third Circuit was faced with a factual situation identical to the one outlined in the paragraph above. It concluded that the defendant's counsel was not afforded any opportunity to object to the discharge of the jury and that the defendant could not be penalized therefor.

> "In addition, the trial judge stated at the hearing that appellant's (defendant's) counsel did not object while the jury was in the box and that he only objected as an "afterthought." While the better practice may be to object as soon as counsel learns that a mistrial is to be granted, appellant's counsel was in a difficult situation. He had no advance warning or notice that a mistrial was to be declared; ..... The Supreme Court's conclusion in United States v. Horn, 400 U.S. at 487, 91 S.Ct. 547, 558, may also be applicable in this situation:
>
> > '[I]ndeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so.'

"Also, to have objected in front of the jury might have prejudiced the appellant for trying to 'show up' the trial judge, especially if some members of the jury actually did want to go home despite their civic obligation. In this situation, we cannot penalize appellant for failing to object sooner." 483 F.2d at p. 17. (Emphasis added; citations omitted.)

B. The jury's collective opinion that it cannot agree.

The common thread running through all cases involving jury deadlock is that the most critical factor in determining the manifest necessity for declaring a mistrial is the collective jury opinion that it is hopelessly deadlocked. If the jury collectively agrees that it is deadlocked, then the jury should properly be discharged.

Merely interrogating the jury foreman is not enough, however. In Webb, supra, the Court conducted a short interrogation of the jury foreman that went significantly further than the interrogation conducted by the trial court of the jury foreman in the instant case.

In the case at bar, no effort was made by the trial court to determine the beliefs of any of the jurors. The following language from the Webb opinion is particularly applicable in the instant case, and would seem sufficient to dispose of the issue of manifest necessity, in favor of the Respondent, in and of itself.

"In any event there is no clear showing that the foreman's responses [to the trial judge's questions] here necessarily represented the unanimous opinion of the jury, or even that of a majority of the panel. The record, therefore, especially

with regard to an adjudication affecting constitutional rights, does not furnish an adequate showing that it was the collective sentiment of the jury that they had reached an impasse." 516 F.2d at 1044."

C. Any proper communication which the Judge has had with the jury.

There is no evidence in the case at bar of any relevant communication between the trial judge and the jury other than the colloquy between the trial court and the jury foreman immediately prior to the jury's discharge. Thus, this factor sheds no light on the question of manifest necessity for declaration of a mistrial in the instant case.

The hearing, held on April 15, 1980, more than one month after the previous trial and less than 24 hours prior to the scheduled third trial of the Respondent, amounts to nothing more than an attempt by the Petitioners to lift themselves up by their own bootstraps and thereby confuse the issues in an attempt to justify their position. The hearing held before the state Court trial judge, was conducted for the ostensible purpose of ruling on Petitioner's Motion to Dismiss the indictment, based on the same grounds for which he ultimately successfully sought habeas relief. As the trial judge must have been aware, on March 11, 1980, of the reasons why he declared a mistrial due to jury deadlock, any after-the-fact hearing to determine what those reasons were would appear to be totally irrelevant to the issue at hand, and could serve no purpose other than to futilely attempt to cure a glaring deficiency in the record of the trial.

One final alleged fact elicited at the hearing of the trial court on April 15, 1980, upon which the Court stated that it relied in declaring a mistrial was that one of the jurors had been tried by the Court on a drug charge "some years earlier" and that because of the effect of the Virginia expungement statute that juror had not been convicted. The trial court stated that this led to its strong feeling that "the jury was hung when the foreman said it was hung." (Appendix, p. 4). Of course, the foreman never said that the jury was hung. (Appendix, p. 6).

It is impossible to imagine what relevance the prior trial on a drug charge of one of the members of the jury could have had on a determination of whether the jury in the case at bar was deadlocked. Was the juror in question more apt to vote for acquittal or more apt to vote for conviction? Was the jury "leaning" toward acquittal or conviction? (At a later time, it was learned that the jury had, in fact, voted 10-2 for acquittal immediately prior to being dismissed.) What impact could the fact that one juror had previously been tried, but not convicted, of a crime by the trial court have had on the jury's deliberations? The answer, of course, is that the record is devoid of any evidence that might answer these questions. Once again the Petitioners have asked this Court to idly speculate in hindsight, what that impact might have been. It is precisely this sort of speculation that the manifest necessity standard was intended to prevent.

The trial Court, of course, could have dismissed the juror in question, sua sponte, when the jury was first impanelled. The Court, however, chose not to do this. It could also have informed the Commonwealth and defense counsel of the prior experience of the juror in question and thereby allowed counsel to choose whether to allow that particular juror to sit in judgment of the case. Again, the Court chose not to do this.

There is apparently no dispute that under Virginia law this juror was qualified to sit on a jury. The Court having failed to exercise its prerogative to dismiss the juror, sua sponte, and having failed to notify counsel of that juror's past trial, a fact peculiarly within the Court's own knowledge, it is inconceivable that, after the trial of the Respondent and while the jury was deliberating, a manifest necessity for declaring a deadlocked jury and a mistrial could suddenly arise that would justify subordinating the Respondent's Fifth Amendment rights against double jeopardy.

The alleged facts elicited by the state trial Court at the hearing on April 15, 1980, raise the unpleasant specter of the necessity of questioning the motivations of a trial Court any time the propriety of its declaration of mistrial because of jury deadlock is challenged either on appeal or by a Petition for a Writ of Habeas Corpus. It is precisely because of the need to prevent this sort of unpleasant inquiry

into the motivations of trial Courts that the Circuit Courts of Appeals have required that manifest necessity appear in the record of the trial at the time the mistrial is declared, and that in cases of jury deadlock that the jury's own statement that it is deadlocked is the "crucial factor."

The inherent problem of inquiry into judicial motivation created by the lack of evidence on the record demonstrating that the jury is deadlocked is perhaps best stated by the Court in United States ex. rel. Russo v. Superior Court of New Jersey, 483 F.2d at p. 16, n. 15.

> "We cannot emphasize too strongly that there is nothing to lead us to suspect that the trial judge was guilty of ... manipulation. But the possibility exists and is a factor which we definitely must consider. The alternatives are to allow the discretion of the trial judge to go unchecked or to become embroiled in embarrassing inquiries into his motives in each particular case."

The only way to adequately resolve this dilemma is to require that the record clearly demonstrate that the jury is hopelessly deadlocked at the time the jury is dismissed - as is mandated by Webb, Russo, Lansdown, Horn and Arnold, supra. But that is precisely what was not done in the instant case.

The well-established judicial principle of double jeopardy is not only intended to prevent a defendant from twice being punished for the same offense, it is also intended to prevent the defendant from being twice jeopardized for the same offense. The reasons for strict adherence to the double jeopardy proscription of the Fifth Amendment are well set out in the following

two quotes from the recent Supreme Court opinions:

> "The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 22, 2 L.Ed. 2nd 199 (1957).

> "A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed. 2d 543 (1969).

In cases involving jury deadlock, however, the State possesses an interest opposed to the interests of the criminal defendant set out above, i.e., the opportunity to prosecute a criminal defendant to the State's fullest capacity - vis a vis, the defendant's right to have a verdict rendered either in his favor or against him.

As early as 1824, this Court recognized these countervailing interests and, in United States v. Perez, supra, adopted a reasonable standard, i.e., manifest necessity, to insure the protection of both interests. It is precisely these standards which were not met by the trial Court on March 11, 1980, and for that reason, the Respondent respectfully submits that the hold-

ing of the United States Court of Appeals for the Fourth Circuit was correct.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

JOSEPH G. MOORE, JR.

By _____
Joseph S. Bambacus, Of Counsel

Joseph S. Bambacus
605 Mutual Building
Richmond, VA 23219
Counsel for Respondent.

CERTIFICATE OF SERVICE

I, Joseph S. Bambacus, Counsel for the Respondent in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before March 25, 1981, I mailed a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to Linwood T. Wells, Jr., Assistant Attorney General, Supreme Court Building, Richmond, VA 23219 and to Marshall Coleman, Esquire, Attorney General of Virginia, Supreme Court Building, Richmond, VA 23219, counsel for Petitioners.

_____
Joseph S. Bambacus

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1474

ANDREW J. WINSTON, Sheriff,
City of Richmond,

Aubrey M. Davis, Commonwealth's Attorney
for the City of Richmond,

CIRCUIT COURT OF THE CITY OF RICHMOND
DIVISION I

Petitioners,

v.

JOSEPH G. MOORE, JR.

Respondent.

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

COMMONWEALTH OF VIRGINIA

V.

JOSEPH G. MOORE, JR.

Transcript Of Proceedings

Held Before

Judge James M. Lumpkin

On

Tuesday, April 15, 1980

Witness: No, I don't.

Atty: Thank you.

Comm: Judge, I have one more witness. I'd like to call Sheriff Johnson.

Judge: All right.

Clerk: Do you solomly swear that the evidence given to this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

Sheriff: I do.

Comm: Will you tell the court please your name and where you're employed?

Sheriff: Franklin L. Johnson, United States Army retired, employed by the Sheriff's Department, City of Richmond.

Comm: Were you working in Judge Lumpkin's Court on March 10th, 1980, during the Joseph Moore trial?

Sheriff: Yes.

Comm: At the beginning of the trial, after the jury was chosen, did you recall anything unusual when the jury first came out, before the trial had even started?

Sheriff: Nothing too much, just tired.

Comm: Were there any complaints from any of the jurors at that time?

Sheriff: Not at that time.

Comm: Were there any complaints later on?

Sheriff: Later on, yes.

Comm: What happened?

Sheriff: We did unlock the back door and two of the deputies were at this door, and we cracked that door,

Atty: Well, that door was locked. That's the door from which prisoners come and go.

Sheriff: That's correct, sir.

Atty: So with the exception of the door that the judge uses to come and go which was covered by two deputies and the jury room, the courtroom was effectively sealed from anybody elses interference?

Sheriff: That's correct.

Atty: No one had access to it?

Sheriff: That's correct.

Atty: Did you ever indicate to his honor the fact that the lady was crying or had red eyes or anything?

Sheriff: No, not at that point.

Atty: And you didn't think it of significant importance to tell him that night or the next day, did you?

Sheriff: Well, I told him that they wanted to go home, one man said that he wanted to go home and he had to feed his sick wife.

Atty: But you didn't deem it of significant importance to tell the judge that some juror was emotionally upset or sick?

Sheriff: Well...No, but the judge here had been working with them in the courtroom it is very obvious, and they can see as well as you can can't they.

Atty: Thank you Mr. Johnson.

Carol: I have one more question. The next morning they said they were asking you about the appearance of the jurors

Judge: reached a verdict the evening before, they had not reached a verdict that morning, I sensed considerable discord in the jury and among the jurors. One of the 12 jurors had been tried in this courtroom on a drug charge some years earlier and the expungement statute had been effected, the effect of which was that she was not convicted. I recall also a drug case I had had 5 or 6 years ago with a jury and I believe that same juror was even present in the courtroom, as an interested spectator in the Jefferson jury case about 1972. At any rate she remained on the jury. I mention that because the consequence of all of this was my strong feeling that this jury was hung when the foreman said it was hung. Having never before experienced from jurors what had happened with these 2, as the transcript shows, I said to the jury then that I am going to excuse you in a moment but I have some remarks to address to two of the jurors, and I did not name names, but I knew that they knew of whom I spoke, and that it on pages 5, 6, and 7 of the transcript. I guess it is safe to characterize it as a chastizement of those two jurors. At any rate, at that time I discharged the jury and would do the very same today were it to arise. I otherwise concur in the argument presented by the Commonwealth's Attorney and see no need to repeat references to cases or other arguments. Motions, Mr. Bambaccus, are denied and the case is set with a jury tomorrow at 10:00 o'clock.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND,

DIVISION ONE

COMMONWEALTH OF VIRGINIA

v.

JOSEPH G. MOORE

Transcript of the evidence and other incidents of the above when heard on March 11, 1980, before the Honorable James M. Lumpkin, Judge.

APPEARANCES:

Carol A. N. Breit,
Attorney for the Commonwealth

Joseph S. Bambacus, Esq.,
Attorney for the Defendant

consider its verdict, after which the jury returned into the Court and the following occurs:

THE COURT: Counsel waive the poll as to names?

MISS BREIT: The Commonwealth waives.

MR. BAMBACUS: The defense waives.

THE COURT: All right, Mr. Beatty, what is the situation?

(No response is heard)

THE COURT: We don't want to know any particulars of deliberations but, of course, the question is, have you reached a verdict?

MR. BEATTY: Your Honor, the jurors have not been able to reach a verdict.

THE COURT: All right, I'm going to excuse you in a moment, I'm sorry that you weren't able to reach a verdict because it's a case that -- in which there should have been a verdict.

I want to direct a remark or two to two of the jurors specifically who, along about

six o'clock last evening, notified the Sheriff that they couldn't stay.

Nobody told me about it until six o'clock and jury duty is a civic obligation. Wherever any juror has any responsibilities at home or otherwise we try to cooperate with the jury.

If you have to be excused on specific dates because of vacation or because of any reasonable reason, I don't know a Judge in this building who wouldn't accede to any reasonable request. But as I got the message about six o'clock, two of you simply couldn't stay any longer.

Well, I don't like that and jurors, like anybody else, are subject to rules and regulations regarding contempt of Court and while it is a rare thing that a juror has to stay at night there are times when it's necessary and there are times when there are jury cases day after day after day and it's necessary.

We try to be reasonable about it and I think I've been reasonable about it and -- with this jury and any other jury. As I say,

nobody told the jury officer to my knowledge, nobody told me, nobody told my Sheriff or anybody until six o'clock when two of you demanded to leave.

I don't like it, I don't appreciate it and if you're on a jury here, any of you, I want you to let the Sheriff or me know early in the morning whatever problems you may have at home or otherwise.

All right, thank you, you are excused.

NOTE: At this time the Court discharged the jury from further consideration of the case, after which the recording device ceases to operate. When it resumes late operation Counsel is already speaking:

MR. BAMBACUS: . . . . detective in the case.

THE COURT: Who is the detective.

MR. BAMBACUS: Detective Murphy.

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I

COMMONWEALTH OF VIRGINIA

Plaintiff

v. F 11-193

JOSEPH G. MOORE, JR.

Defendant

PLEA OF FORMER JEOPARDY
AND
MOTION TO DISMISS

Comes now the defendant and moves the Court to dismiss the indictment in this action on the grounds that this defendant has been twice placed in jeopardy of the offense charged in the indictment in the case of Commonwealth of Virginia v. Joseph G. Moore tried on January 9, 1980, and again on March 10, 1980, and the trial scheduled in this Court on April 16, 1980, would violate the defendant's rights under the Double Jeopardy clause of the Fifth Amendment to the Constitution of the United States; the Fourteenth Amendment to the Constitution of the United States; as well as Article I, Section 8, of the Constitution of the Commonwealth of Virginia.

The defendant submits the attached statement of facts and memorandum of law in support of this motion.

_____
Joseph G. Moore

_____
Joseph S. Bambacus and
Stylian P. Parthemos
Counsel for the Defendant
605 Mutual Building
Richmond, Virginia 23219

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

This day personally appeared before me, _____.

a Notary Public in and for the City and State aforesaid, JOSEPH G. MOORE, and made oath that the allegations contained in this motion are true.

Given under my hand this 21st day of March, 1980.

My Commission expires: January 31, 1982

/s/ Effie P. Dover
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have this 24 day of March, 1980, hand delivered mailed a true and exact copy of the foregoing Plea of Former Jeopardy and Motion to Dismiss to Carol Breit, Assistant Commonwealth's Attorney for the City of Richmond to her office address, Office of the Commonwealth's Attorney, Second Floor, John Marshall Courts Building, 800 East Marshall Street, Richmond, Virginia 23219.

March 24, 1980

Honorable James M. Lumpkin, Judge
Circuit Court of the City of Richmond,
Division I
John Marshall Courts Building
800 East Marshall Street
Richmond, Virginia 23219

Re: Commonwealth of Virginia
v. Joseph G. Moore, Jr.
F 11-193

Dear Judge Lumpkin:

I am enclosing Motion to dismiss the indictment in the captioned case which has as its basis a violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. I am enclosing a 16-page brief in support of this motion.

In the event the Court desires oral argument before ruling on the motion, I would like to have the argument as soon as possible. Your Honor's determination of the enclosed motion would constitute an exhaustion of State remedies, and in the unforeseeable event that Your Honor overrules the motion, I would want to apply for habeas relief in the appropriate forum. Likewise, I would like to know if the Court will insist upon the trial being held on April 16, 1980, as previously scheduled. If the Court will not continue the case pending determination of the issues raised, I would be compelled to schedule a hearing for a temporary restraining order pending resolution of the issues.

I tried to contact Your Honor with regard to the enclosed motion and was told by your clerk to file the motion and supporting brief, and I would be advised as to whether Your Honor would want oral argument and of the Court's ruling. I have been unable to file this motion sooner because I have been working on the legal research in addition to handling my trial schedule, and the brief was not completed until Friday afternoon, March 21, 1980.

Respectfully yours,

Joseph S. Bambacus

JSB/ed

encls.

cc: Ms. Carol Breit
Assistant Commonwealth's Attorney

Circuit Court
OF THE
City of Richmond

JAMES M. LUMPKIN
JUDGE

JOHN MARSHALL COURTS BUILDING
800 EAST MARSHALL STREET
RICHMOND, VIRGINIA 23219

April 10, 1980

Carol A. N. Breit, Esquire
Assistant Attorney for the Commonwealth
John Marshall Courts Building
800 East Marshall Street
Richmond, Virginia 23219

Joseph S. Bambacus, Esquire
Bambacus and Associates
605 Mutual Building
Richmond, Virginia 23219

Re: Commonwealth v. Joseph G. Moore, Jr.

Dear Ms. Breit and Mr. Bambacus:

I have reviewed the memoranda of law submitted by each of you, as well as my own trial notes.

The Statements of Facts are not in substantial agreement on critical factual issues. Hence a hearing will be held and Tuesday, April 15 at 3:00 P.M. appears the only feasible time.

Both sides should be prepared for trial April 16.

Very truly yours,

James M. Lumpkin

JML/np

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOSEPH G. MOORE, JR., Petitioner	)	
v.	)	Civil Action No.
ANDREW J. WINSTON, SHERIFF, CITY OF RICHMOND,	)	
AUBREY M. DAVIS, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND,	)	
and	)	
CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I Respondents	)	

PETITION FOR WRIT OF HABEAS CORPUS AND
APPLICATION FOR TEMPORARY RESTRAINING
ORDER, PRELIMINARY INJUNCTION AND
PERMANENT INJUNCTION

Your petitioner, Joseph G. Moore, Jr., moves this Court for a writ of habeas corpus pursuant to Title 28, Section 2254, U.S.C.A., and a temporary restraining order, preliminary injunction and permanent injunction by reason of the following:

1. On December 3, 1979, the petitioner was indicted by a Grand Jury of the Circuit Court of the City of Richmond,Division I, pursuant to Section 18.2-91 of the Code of Virginia of 1950, as amended, for allegedly breaking and entering into the residence of Bill McGowan, 2623 Hanover Avenue, Apartment 1, Richmond, Virginia, with intent to commit larceny therein (Case No. F 11-193).

On January 9, 1980, the defendant was tried before a jury of the Circuit Court of the City of Richmond,Division I, and after the presentation of the evidence by both the Commonwealth and the defense, the jury was instructed, closing arguments of counsel were made and the jury retired for deliberation at approximately 5:00 o'clock p.m. At approximately 6:30 o'clock p.m. on that same date, after receiving word from the foreman of the jury that the

jury was unable to reach a verdict, and after advising counsel for the Commonwealth and for the defendant of the communication from the foreman, the Court summoned the jury into the courtroom, and after a brief colloquy before the Court with the foreman of the jury wherein the foreman voiced his opinion that the jury was deadlocked, the Court discharged the jury from rendering any further service in the case and a mistrial was declared.

3. Subsequent to the first declaration of mistrial on January 9, 1980, the defendant was again tried on the same indictment on March 10, 1980. The jury was impanelled and evidence was taken. With a few exceptions, the evidence at the trial of March 10, 1980, was essentially the same as the evidence at the trial on January 9, 1980. At the conclusion of all the evidence, the instructions to the jury and closing arguments, the jury retired for deliberation at approximately 4:35 o'clock p.m. At approximately 5:45 o'clock p.m., a communication was sent by the Jury to the Court that two of the jurors wanted to retire for the evening. After consulting with counsel for the Commonwealth and for the defendant, the Court recessed the jury for the evening at approximately 6:00 o'clock p.m., with instructions to reconvene at 10:00 o'clock a.m. to continue their deliberations.

4. The jury returned to the Court at 10:00 o'clock a.m. on the morning of March 11, 1980, and shortly thereafter the jury continued their deliberations. At approximately 10:50 o'clock a.m., counsel were summoned to the courtroom by the Court without any notice as to the purpose therefor, and without any consultation between the Court and counsel. Further counsel had no knowledge of the purpose for which the Court had reconvened. At that time the Court asked the foreman of the jury if the jury had been able to reach a verdict. The foreman stated that the jury had not reached a verdict. The Court did not even interrogate the Jury

foreman as to whether he believed the jury would be able to reach a verdict. Without any further interrogation of the jury panel, i.e., the other eleven members of the jury, or without any further interrogation of the individual members thereof, and without affording counsel for the defendant an opportunity to object, the Court discharged the jury and declared a mistrial. Immediately thereafter, the Court scheduled a third trial of the defendant upon the same indictment on April 16, 1980, at 10:00 o'clock a.m.

5. The petitioner has filed no petitions, applications or motions for relief except for a Plea of Former Jeopardy and Motion to Dismiss with a supporting brief in the Circuit Court of the City of Richmond, Division I, on March 24, 1980, a copy of said Plea of Former Jeopardy and Motion to Dismiss is hereto attached and made a part hereof as petitioner's Exhibit No. 1. On the morning of April 14, 1980, counsel for the petitioner received a letter from The Honorable James M. Lumpkin, Judge of the Circuit Court of the City of Richmond, Division I, advising counsel that the Statements of Facts are not in substantial agreement on critical factual issues. Further, The Honorable James M. Lumpkin has scheduled a hearing for Tuesday, April 15, 1980, at 3:00 o'clock p.m., notwithstanding that a transcript of the proceedings on the morning of March 11, 1980, was prepared by the official court reporter of the court from a recording of the proceedings at page 5 of which the pertinent colloquy between the Court and the jury foreman is set forth. A copy of the transcript of such proceedings is hereto attached and made a part hereof as petitioner's Exhibit No. 2. The Court further directed that both sides should be prepared for trial on April 16. A copy of the letter from The Honorable James M. Lumpkin is hereto attached and made a part hereof as though fully set out herein as petitioner's Exhibit No. 3.

6. The hearing scheduled for 3:00 o'clock p.m. on April 15, 1980, does not afford your petitioner an opportunity for injunctive relief or habeas relief in the event of an adverse ruling and the mere threat of being required to go to trial on the morning of

April 16, 1980, is violative of the petitioner's rights under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States so as to entitle him to injunctive relief from being tried on April 16th pending disposition of this petition.

7. The petitioner alleges that he has exhausted his State remedies and that any adverse ruling on his Plea of Former Jeopardy and Motion to Dismiss is not appealable to the Supreme Court of Virginia for the reason that it is not a final Order and that he is entitled to initiate this proceeding as well as to the relief prayed for herein.

8. The grounds in support of this petition are;

a. The actions of the Circuit Court of the City of Richmond, Division I, as alleged in paragraphs 1 through 6 herein were such that the scheduled trial of the petitioner on April 16, 1980, violates the petitioner's rights under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States in that the petitioner has been thrice placed in jeopardy of the offense charged in the indictment.

b. The discharge of the jury and the declaration of a mistrial on March 11, 1980, by the Circuit Court of the City of Richmond, Division I, as aforesaid, was not dictated by a manifest necessity.

c. The Circuit Court of theCity of Richmond, Division I, failed;

(i) to afford counsel for thepetitioner an opportunity for a timely objection to the discharge of the jury and declaration of a mistrial as well as an opportunity to be heard on the necessity therefor;

(ii) to ascertain the opinion of the jury foreman or the individual or collective opinion of the entire jury;

(iii) to afford the jury in both trials sufficient time to deliberate and to deal with the conflicting testimony of the Commonwealth's witnesses and their contradictions and to weigh the same against the evidence of the defendant; the Commonwealth having called seven (7) witnesses and the defendand having called five (5) witnesses, for a total of twelve (12) witnesses;

(iv) to consider that while the legal issues presented to the jury were relatively simple ones, namely, did the petitioner break and enter into the residence at 2623 Hanover Avenue, Apartment 1, in the daytime with intent to commit larceny therein, the approximately 2-1/4 hours of deliberation by the jury at the trial of March 10-11, 1980, as well as the 1-1/2 hour of deliberation at the trial on January 9, 1980, were not so lengthy as to raise even a suspicion that the case could not have been resolved by either jury if permitted to deliberate further, and there was no manifest necessity for the Court to discharge the jury and declare a mistrial, particularly when the inconsistent testimony of the seven witnesses called by the Commonwealth is considered together with the exhibits introduced by the Commonwealth and the defense. (See transcript of the evidence and other incidents of trial on January 9, 1980, hereto attached and made a part hereof as petitioner's Exhibit No. 4.);

(v) to advise counsel of the purpose for which the Court was reconvened at approximately 10:50 o'clock a.m. on March 11, 1980, and further, the Trial Court failed to advise counsel for the defendant of communications, if any, from the foreman of the jury to the Trial Court;

(vi) to consider that there was not the remotest possibility of any exhaustion on the part of the jury, they having deliberated for less than an hour on the morning of March 11, 1980, and nothing in the record would suggest an adverse impact which coercion of further deliberation might have had on the verdict;

(vii) to consider that the petitioner having previously been tried on the indictment as aforesaid on January 9, 1980, an even greater amount of caution, efficiency and obviousness was required of the Trial Court on March 11, 1980, prior to the discharge of the jury and the declaration of a mistrial, because the consequence to the petitioner of the action by the Court subjected the petitioner to yet a third trial;

(viii) that there was no declaration of opinion from any member of the jury, including the foreman, that the jury was deadlocked, and that the action taken by the Trial Court, sua sponte, deprived the petitioner of his right to a verdict, and has the same force and effect as an acquital of the petitioner.

d. That the refusal of the Circuit Court of the City of Richmond to delay or continue the third trial scheduled for April 16, 1980, requires that this Court enter a temporary restraining order and a preliminary and/or permanent injunction in order to

protect the petitioner's rights herein asserted.

e. Your petitioner is presently incarcerated in the Richmond City Jail and is being held there by the defendant, Andrew J. Winston, Sheriff of the City of Richmond, pursuant to Order of the Circuit Court of the City of Richmond, Division I.

Wherefore, your petitioner prays that this Court:

1. Enter a temporary restraining order, restraining the defendants from again trying the petitioner under the indictment aforesaid, and that such temporary restraining order be enlarged into a preliminary injunction and/or permanent injunction should the defendants persist in trying your petitioner for a third time prior to the disposition of the issues raised in this complaint.

2. That this Court grant the petitioner a writ of habeas corpus on the grounds that this petitioner has been twice put in jeopardy for the offense charged in the indictment pending in the Circuit Court of the City of Richmond, Division I.

Your petitioner, Joseph G. Moore, Jr., declares under penalty of perjury that the allegations contained in the foregoing petition for a writ of habeas corpus are true and correct to the best of his information, knowledge and belief.

Executed on this 15th day of April, 1980.

Joseph G. Moore, Jr.

Joseph G. Moore, Jr.

Joseph S. Bambacus
Bambacus and Associates
605 Mutual Building
Richmond, Virginia 23219
Counsel for Petitioner

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

This day personally appeared before me, Effie P. Davis, a Notary Public in and for the City and State aforesaid, JOSEPH G. MOORE, and made oath that the allegations contained in this Petition and Application are true.

Given under my hand this 15th day of April, 1980.
My Commission expires: January 3, 1982.

Effie P. Davis
Notary Public

THE COURT: Let me talk with Mr. Garrett. Mr. Garrett, is it agreed that Webb, Rusoe, and Landsdown are the law?

MR. GARRETT: Off the top of my head, I would think they are, Your Honor. I haven't since yesterday afternoon had a chance to read all those cases.

THE COURT: Did you say yes?

MR. GARRETT: Yes, sir, I think that is the law.

THE COURT: Is it further agreed that there has been exhaustion?

MR. GARRETT: I'm not really sure there has been, Your Honor, for the reason -- Yesterday at three o'clock or shortly thereafter, Mr. Bambacus presented to the Virginia Supreme Court a writ for petition of habeas corpus, a petition for temporary restraining order, preliminary injunction and the subsequent permanent injunction. That was denied at 3:35 p.m. At that time the circuit court had not ruled on the motion to dismiss the indictment, on the grounds of double jeopardy, by Mr. Bambacus.

Now, the Supreme Court, when it came back, through Chief Justice I'Anson, and made its decision did not state why they ruled the way they did. It

through the habeas petition, not through interlocutory appeal.

THE COURT: It seems to me, Mr. Bambacus, that your verified complaint in this Court, or petition, I should say, fully states the case under Rusoe and Webb. I am not sure that Mr. Garrett would disagree that the verified petition fully states a Webb and Rusoe case.

Now, under Webb and Rusoe I would be obligated to enter a temporary restraining order. It is not clear from what you and Mr. Garrett tell me that you have exhausted your state remedies, and that is a requirement of the statute and of the law, that you first exhaust your state remedies. That, frankly, is the only question I have.

I have no question about your petition fitting the requisites of Webb and Rusoe. And I think it's agreed that Webb and Rusoe correctly state the law, along with Landsdown.

MR. BAMBACUS: May I address the Court?

THE COURT: Yes, sir. What proof do you have -- Mr. Garrett, if you'll give way, I'll find out exactly what proof he has that he has exhausted state remedies.

MR. BAMBACUS: Your Honor, the motion to

THE COURT: In light of the additional --

MR. GARRETT: In light of the additional fact that the circuit court has denied his motion to dismiss the indictment.

THE COURT: Let me see if you agree with me. I think I asked you this before. Do you agree with me that if the facts are as set forth in the petition that Webb and Rusoe would direct and require that I issue a writ of habeas corpus?

MR. GARRETT: It's been some time since I read those cases, but I believe that's what those cases say.

THE COURT: Sir?

MR. GARRETT: It's been a while since I read those cases. I believe that's what those cases say.

THE COURT: Under those circumstances, I'm going to issue a temporary restraining order for a limited period of time, until tomorrow morning at 9:30, to enable Mr. Bambacus to either file a new petition for a writ of habeas corpus with the Supreme Court of Virginia or a petition for a writ of habeas corpus with the circuit court, with the requirement that if that is adverse that he appeal to the Supreme Court of Virginia.

presented by way of petition and supporting arguments.

THE COURT: Let me interrupt one second. Do you concur, sir?

MR. GARRETT: Yes, sir.

THE MARSHAL: Stand up, please, when you're addressing the court.

MR. GARRETT: Yes, sir, I concur that exhaustion has been accomplished.

MR. SHUFORD: Now, if Your Honor please, it seems also at this point that the orderly administration might be helped if I took cognizance of the fact that no answer has been filed to the petition. The court had made some statements yesterday which I heard for the first time, my involement in the case being nil up to that time, that it was thoroughly familiar with the factual allegations of the petition and with the cases of Rusoe and Webb, which I attempted to familiarize myself with, and that if the facts, as I understood Your Honor, if the facts as alleged in the petition were correct, the court was constrained to follow Rusoe and Webb and grant this unusual remedy, relief.

THE COURT: In which Mr. Garrett concurred if those facts were correct, then it meets the requirements of Rusoe and Webb and that Rusoe and Webb are the controlling law.

RECEIVED
MAR 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

ANDREW J. WINSTON,
et. al.,
Petitioners,

v. Case No. 80-1474

JOSEPH G. MOORE,
Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS
and
~~EXTENSION OF TIME FOR RESPONDENT'S BRIEF IN OPPOSITION~~

Comes now the respondent, Joseph G. Moore, by counsel, and moves the Court to authorize the defense of this appeal in forma pauperis, pursuant to Rule 53 of the Rules of the United States Supreme Court as well as an extension of time from the granting of this motion to file his brief in opposition. As and for his grounds for this motion, your respondent says as follows:

1. This action is an appeal from a ruling of the United States Court of Appeals for the Fourth Circuit affirming the ruling of the Unites States District Court for the Eastern District of Virginia, Richmond Division, granting your respondent a writ of habeas corpus pursuant to Title 28, Section 2254 of the United States Code, as amended;

2. That your respondent is unable to pay fees and costs, including printing costs, or any part thereof, or to give security therefor for the defense of this action;

3. That your respondent filed an affidavit in the United States Court of Appeals for the Fourth Circuit wherein he made a full and complete disclosure of his assets and sources of income; and pursuant to said affidavit, the United States Court of Appeals for the Fourth Circuit granted your respondent leave to proceed with the defense of that appeal in forma pauperis and appointed Joseph S. Bambacus as counsel for your respondent;

4. That as a result of the foregoing, your respondent believes that he is entitled to redress under Rule 53 of the Rules

of the United States Supreme Court.

WHEREFORE, your respondent hereby moves the Court for leave to defend this appeal in forma pauperis pursuant to Rule 53 of the Rules of the United States Supreme Court, and an extension of 30 days from the granting of this motion within which to file his brief in opposition.

JOSEPH G. MOORE

By _____
Counsel

_____
Joseph S. Bambacus
Bambacus & Parthemos
605 Mutual Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1981, mailed a true and exact copy of the foregoing Motion to Proceed in Forma Pauperis and Extension of Time for Respondent's Brief in Opposition to Linwood T. Wells, Jr., Counsel for Petitioners, to his office address, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219.

_____

SUPREME COURT OF THE UNITED STATES

ANDREW J. WINSTON,
et. al.,
Petitioners,

v. Case No. 80-1474

JOSEPH G. MOORE,
Respondent.

AFFIDAVIT

This day personally appeared before the undersigned Notary Public, Joseph S. Bambacus, who after being duly sworn, doth depose and say as follows:

1. That I was court-appointed counsel for the Respondent, Joseph G. Moore, in the United States Court of Appeals for the Fourth Circuit, in defense of an appeal from a judgment of the United States District Court of the Eastern District of Virginia, Richmond, Division, granting to the respondent a writ of habeas corpus, pursuant to Title 28, Section 2254 of the United States Code, as amended.

2. That the respondent filed an affidavit in the United States Court of Appeals for the Fourth Circuit wherein he made a full and complete disclosure of his assets and sources of income; and pursuant to said affidavit, the United States Court of Appeals for the Fourth Circuit, authorized the respondent to proceed with the defense of that appeal in forma pauperis and appointed Joseph S. Bambacus as counsel for the respondent.

3. That there has been no change in the assets or income of the respondent since the filing of the affidavit by the respondent in the United States Court of Appeals for the Fourth Circuit, the respondent having been in the custody of the Commonwealth of Virginia continually for the past twelve months.

4. That the respondent is unable to pay fees and costs, including printing costs or any part thereof, or to give security

therefor for the defense of this appeal.

5. That by reason of the foregoing, the respondent is entitled to proceed pursuant to Rule 53 of the Rules of the United States Supreme Court.

Joseph S. Bambacus

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

I, Deborah C. Bowen, a Notary Public in and for the City/County of Richmond, in the State of Virginia, do hereby certify that Joseph S. Bambacus, whose name is signed to the foregoing Affidavit, has acknowledged the same before me in my City/County of Richmond aforesaid.

Given under my hand this 10th day of March, 1981.

My commission expires: March 1, 1982.

Deborah C. Bowen
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1981, mailed a true and exact copy of the foregoing Affidavit to Linwood T. Wells, Jr., counsel for the Petitioners, to his office address, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219.